



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2011–0053]

[4500030114]

RIN 1018–AX43

Endangered and Threatened Wildlife and Plants; Designation of Revised Critical Habitat for the Southwestern Willow Flycatcher

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the public comment period on the August 15, 2011, proposed designation of revised critical habitat for the southwestern willow flycatcher (*Empidonax traillii extimus*) (flycatcher) under the Endangered Species Act of 1973, as amended (Act). We are

reopening the comment period to allow all interested parties an opportunity to comment on our amended required determinations and revisions to the proposed revised designation, which include additional areas as proposed critical habitat on two streams within the Santa Cruz Management Unit, Arizona, and revisions to areas being considered for exclusion under section 4(b)(2) of the Act. We are accepting comments on the draft environmental assessment prepared in compliance with the National Environmental Policy Act (NEPA) and the draft economic analysis associated with the proposed rule. We are also providing notice of a public informational session and hearing (see **DATES** and **ADDRESSES**). Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of the final rule.

DATES: *Written comments:* We will consider comments received on or before [INSERT DATE 60 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION]. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date.

Public informational session and public hearing: We will hold a public hearing on August 16, 2012, in San Carlos, AZ (see **ADDRESSES**). The hearing is open to all who wish to provide formal, oral comments regarding the proposed rule, and will be held from 6:30 p.m. to 8:00 p.m., with an informational session before the hearing from 3:00 p.m. to 4:30 p.m. During the informational session, Service employees will be available to provide information and answer questions.

ADDRESSES:

Document availability: You may obtain copies of the proposed rule, draft economic analysis, and draft environmental assessment on the internet at <http://www.regulations.gov> at Docket No. FWS–R2–ES–2011–0053 or by mail from the Arizona Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Written comments: You may submit written comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. Search for Docket No. FWS–R2–ES–2011–0053, which is the docket number for this rulemaking.

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R2–ES–2011–0053; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the **Public Comments** section below for more information).

Public informational session and public hearing: The public informational session and hearing will be held at Apache Gold Convention Center, Highway 70, 5 miles East of Globe, in San Carlos, AZ 85550. People needing reasonable accommodations in order to attend and participate in the public hearing should contact Steve Spangle, Field Supervisor, Arizona Ecological Services Office, as soon as possible (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Steve Spangle, Field Supervisor, Arizona Ecological Services Office, 2321 West Royal Palm Road, Suite 103, Phoenix, AZ, 85021; telephone 602-242-0201; facsimile 602-242-0513. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on our proposed designation of revised flycatcher critical habitat that was published in the **Federal Register** on August 15, 2011 (76 FR 50542). We are accepting comments regarding additional areas we are proposing as critical habitat in this document and other areas that we are considering for exclusion under section 4(b)(2) of the Act (16 U.S.C. 1531 *et seq.*), as discussed in this document. We are also accepting comments on

the amended required determinations section, the draft economic analysis, and the draft environmental assessment prepared in compliance with NEPA (42 U.S.C. 4321 *et seq.*). We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons why we should or should not designate habitat as “critical habitat” under section 4 of the Act, including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(2) Specific information on:

(a) The distribution of the flycatcher;

(b) The amount and distribution of flycatcher habitat;

(c) What areas that were occupied at the time of listing that contain features essential to the conservation of the species should be included in the designation and why;

(d) What areas not occupied at the time of listing that meet our criteria as being essential for the conservation of the species should be included in the designation and why;

(e) Special management considerations or protection that may be needed for the physical or biological features essential to the conservation of the species in the critical

habitat areas we are proposing, including managing for the potential effects of climate change;

(f) Stream segments, many of which are highlighted in the Southwestern Willow Flycatcher Recovery Plan (Recovery Plan) (Service 2002) and included in this proposed rule, that are not now known to have flycatcher nesting territories or known to only have few nesting flycatchers that may be capable of being improved for flycatcher recovery purposes. We specifically seek information about streams within the Amargosa, Salton, Mohave, Powell, San Juan, Santa Cruz, and Hassayampa and Agua Fria Management Units. Please provide information on flycatcher distribution and abundance, habitat quality, habitat locations, habitat improvement projects, management actions needed to improve habitat, habitat quality limitations, habitat recovery potential, and any other flycatcher or flycatcher-habitat-specific information, and;

(g) Flycatcher habitat suitability for recovery in areas within the Santa Ana and San Diego Management Units in southern California, specifically in the following areas: (1) Entirety of Temescal Wash including Alberhill Creek in Riverside County; (2) entirety of Murrieta Creek in Riverside County; (3) Potrero Creek near the city of Beaumont in Riverside County; (4) Cajon Creek from Lone Pine Canyon to California State Highway 138 in San Bernardino County; and (5) Tijuana River from Dairy Mart Road to the Tijuana River Estuary in San Diego County.

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(4) Information on the projected and reasonably likely impacts of climate change on the flycatcher, the features essential to its conservation, and the areas proposed as revised critical habitat.

(5) Any probable economic, national security, environmental, cultural, or other relevant impacts of designating any area that may be included in the final designation; in particular, we seek information concerning any impacts on small entities, and the benefits of including or excluding areas that exhibit these impacts.

(6) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act, in particular:

(a) For specific lands that we should consider for exclusion under section 4(b)(2) of the Act, please provide us management plans, conservation easements, agreements, habitat conservation plans (HCPs), or other appropriate information, which describe the commitment and assurances of protection of the physical or biological features of flycatcher critical habitat; property boundaries; flycatcher status, distribution, and abundance; and management actions to protect the physical or biological features of flycatcher habitat;

(b) For lands we evaluated and excluded from critical habitat under section 4(b)(2) of the Act in our 2005 flycatcher critical habitat designation (70 FR 60886, October 19, 2005) and lands to be newly considered for exclusion in this revision to

designated critical habitat, please resubmit your request. In addition to your request, please include any updated information that pertains to the commitment and assurances of protection of flycatcher habitat; the physical or biological features of flycatcher critical habitat; property boundaries; flycatcher status, distribution, and abundance; and management actions to protect the physical or biological features of flycatcher habitat. Include the specific results of implementing these management plans since our 2005 flycatcher critical habitat designation; and

(c) Information concerning the benefits of excluding or retaining lands we identify in the proposed critical habitat rule and revisions herein under consideration for exclusion under section 4(b)(2) of the Act. We specifically seek information about the possible exclusion of Elephant Butte Reservoir; areas within the operating pool of the reservoir may be subject to exclusion under 4(b)(2) of the Act if we determine that the benefits of excluding the area due to potential impacts to water operations outweigh the benefits to the subspecies of including the area as critical habitat.

(7) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

(8) Information on the extent to which the description of economic impacts in the draft environmental analysis is complete and accurate.

(9) The likelihood of adverse social reactions to the designation of critical

habitat, as discussed in the draft environmental assessment, and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed revised critical habitat designation.

(10) Information on the extent to which the description and evaluation of the proposal included in the draft environmental assessment is complete and accurate.

If you submitted comments or information on the proposed revised rule (76 FR 50542) from August 15, 2011, to October 14, 2011, or since the initial comment period ended, please do not resubmit them. We will incorporate them into the public record as part of this comment period, and we will fully consider them in the preparation of our final determination. Our final determination concerning revised critical habitat will take into consideration all written comments, oral comments received during the public hearing, and any additional information we receive during both comment periods and the time between each comment period.

You may submit your comments and materials concerning the proposed revised rule, draft economic analysis, or draft environmental assessment by one of the methods listed in the **ADDRESSES** section. We request that you send comments only by the methods described in the **ADDRESSES** section.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the website. We will

post all hardcopy comments on <http://www.regulations.gov> as well. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule, draft economic analysis, and draft environmental assessment, will be available for public inspection on <http://www.regulations.gov> at Docket No. FWS–R2–ES–2011–0053, or by appointment, during normal business hours, at the Arizona Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain copies of the proposed rule, draft economic analysis, and draft environmental assessment on the Internet at <http://www.regulations.gov> at Docket No. FWS–R2–ES–2011–0053, or by mail from the Arizona Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT** section).

Background

It is our intent to discuss only those topics directly relevant to the designation of revised critical habitat for the flycatcher in this document. For more information on previous Federal actions concerning the flycatcher, refer to the proposed designation of revised critical habitat published in the **Federal Register** on August 15, 2011 (76 FR 50542). Background information on the flycatcher can be found in the 2005 final flycatcher critical habitat rule published in the **Federal Register** on October 19, 2005 (70

FR 60886); our October 12, 2004, proposed critical habitat rule (69 FR 60706); the Recovery Plan; our first flycatcher critical habitat designation, published July 22, 1997 (62 FR 39129), and corrected on August 20, 1997 (62 FR 44228); the final flycatcher listing rule (60 FR 10694, February 27, 1995); and other documents described and cited in the August 15, 2011, flycatcher critical habitat proposal (76 FR 50542). Other reports can be retrieved from the U.S. Geological Survey's (USGS) flycatcher site at <http://sbsc.wr.usgs.gov/cprs/research/projects/swwf>. No new literature is being cited within this document. The current 2005 critical habitat rule remains in effect while this rulemaking process proceeds. For more information on this revised flycatcher critical habitat proposal, please go online to <http://www.regulations.gov> (at Docket No. FWS–R2–ES–2011–0053) or <http://www.fws.gov/southwest/es/arizona/>. All references cited in the August 15, 2011, flycatcher critical habitat revision proposal (76 FR 50542) can be retrieved from these Web sites. You can also contact the Arizona Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

The flycatcher was listed as endangered on February 27, 1995 (60 FR 10694). On July 22, 1997, we published a final critical habitat designation for the flycatcher along 964 stream kilometers (km) (599 stream miles (mi)) in Arizona, California, and New Mexico (62 FR 39129). We published a correction notice on August 20, 1997, on the lateral extent of critical habitat (62 FR 44228). As a result of a 1998 lawsuit from the New Mexico Cattlegrower's Association, on October 19, 2005 (70 FR 60886), we

published a revised final flycatcher critical habitat designation for portions of Arizona, California, New Mexico, Nevada, and Utah, totaling approximately 1,186 km (737 mi). River segments were designated as critical habitat in 15 of the 32 Management Units described in the Recovery Plan. We were sued by the Center for Biological Diversity over our 2005 critical habitat rule, and on July 13, 2010, we agreed to revise critical habitat. The resulting settlement left the existing critical habitat designation from 2005 in effect, and required that we deliver a proposed rule for a revised critical habitat to the **Federal Register** by July 31, 2011, and a final rule by July 31, 2012. On March 22, 2012, the settlement agreement was modified to make the final rule due to the **Federal Register** by December 14, 2012.

On August 15, 2011, we published a proposed rule to revise critical habitat for the flycatcher (76 FR 50542). We proposed to designate approximately 3,364 stream km (2,090 stream mi) of critical habitat, which includes various stream segments and their associated riparian areas, not exceeding the 100-year floodplain, on a combination of Federal, State, tribal, and private lands in California, Arizona, New Mexico, southern Nevada, Utah, and Colorado. We identified approximately 1,254 km (779 miles) of river habitat that we were considering for exclusion under section 4(b)(2) of the Act. That proposal had a 60-day comment period ending October 14, 2011.

Critical Habitat

Section 3 of the Act defines critical habitat as the specific areas within the

geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

Changes from Previously Proposed Critical Habitat

In this document, we are notifying the public of: (1) two changes to the proposed revision of flycatcher critical habitat, and (2) additional and revised areas that we are considering for exclusion from the final designation of critical habitat. We describe below the two newly proposed changes to the critical habitat designation, and we describe the additional areas being considered for exclusion in the **Consideration of Impacts under Section 4(b)(2) of the Act** section of this document. All other areas proposed on August 15, 2011, remain proposed for designation as critical habitat.

After assessing the overall habitat at the Ash Meadows National Wildlife Refuge in Nevada, we are proposing a reduced area there that would be designated as critical habitat. On August 15, 2011, we proposed approximately 5.7 km (3.5 miles) of Carson

Slough and 100.1 km (62.2 miles) of associated unnamed riparian areas as critical habitat within the Ash Meadows National Wildlife Refuge in the Amargosa Management Unit (76 FR 50542, p. 50568). Following the proposal, we collected new information on the available habitat at Ash Meadows and reevaluated the potential for flycatcher habitat occurrence on the Refuge. We found five separate locations that are essential for flycatcher conservation. These proposed locations total about 2.4 km (1.5 miles) of stream-side riparian habitat, a reduction of about 103.4 km (64.2 mi) from the August 15, 2011, proposed revised critical habitat in the refuge. Management at these locations will be included in the overall management and restoration efforts ongoing at Ash Meadows to recover numerous endemic and listed species. Management of flycatcher critical habitat will be consistent with and complementary to management and recovery needs of the endemic species. Landscape-level improvements at Ash Meadows will continue to restore the natural hydrology, topography, and vegetation communities and provide suitable flycatcher habitat, most likely in the form of Goodding's willow (*Salix gooddingii*) and leather-leaf ash (*Fraxinus velutina*). Both tree species are known to be used by flycatchers during migration and sometimes for nesting. The current areas proposed for critical habitat are expected to provide long-term native plant species communities that will support flycatcher habitat.

We also propose to designate one additional area that occurs in the Santa Cruz Management Unit, Pima County, Arizona, within the Gila Recovery Unit. This change would lengthen, both upstream and downstream, the segment of Cienega Creek that is proposed for designation as revised critical habitat. We are also proposing to designate

as critical habitat two short segments of Empire Gulch, a tributary to the headwaters of Cienega Creek. The new segments of Cienega Creek and Empire Gulch identified in this document constitute an addition of 10.9 km to the areas we proposed for flycatcher critical habitat and the description below supplements the description of the Santa Cruz Management Unit in the August 15, 2011, proposal (76 FR 50542, p. 50574). No change is being identified for the proposed segment of the Santa Cruz River, also included within this Management Unit.

Proposed Critical Habitat Designation

Based on the changes to the proposed critical habitat area discussed below, Table 1 provides an updated accounting of the total areas we are proposing as revised critical habitat. This information revises Table 2 of the August 15, 2011 proposal (76 FR 50542, pp. 50561–50562). These data also reflect minor corrections in the accounting and mapping of some proposed segments, and present total areas (in hectares and acres) in addition to stream lengths reported in the proposed rule. We are currently proposing a total of 3,400 stream km (2,113 stream mi) encompassing 215,551 hectares (ha) (532,636 acres (ac)). This is a net increase of approximately 36 stream km (23 stream mi) from our August 15, 2011, proposal (76 FR 50542).

TABLE 1—Revision to TABLE 2 in the August 15, 2011, proposed rule (76 FR 50542, pp. 50561–50562). Land ownership, by State, of proposed critical habitat areas for southwestern willow flycatcher, listed as approximate stream lengths in km (mi); and approximate area in ha (ac).

State	Federal	State	Tribal	Private	Other/ Unclassified
AZ	465 (289); 42,126 (104,096)	52 (33); 4,530 (11,195)	87 (54); 14,257 (35,231)	378 (235); 21,549 (53,249)	0 (0); 417 (1,031)
CA	288 (179); 13,070 (32,296)	14 (9); 428 (1,058)	24 (15); 7,062 (17,449)	0.3 (0.2); 361 (893)	656 (408); 27,818 (68,740)
CA/AZ	165 (103); 0 (0)	12 (8); 0 (0)	79 (49); 0 (0)	43 (27); 0 (0)	20 (12); 0 (0)
CO	33 (21); 3,546 (8,762)	0.2 (0.1); 26 (64)	26 (16); 1,064 (2,629)	207 (128); 29,221 (72,206)	9 (6); 575 (1,421)
NV	42 (26); 2,330 (5,757)	14 (8); 1,061 (2,622)	0 (0); 2 (6)	21 (13); 1,496 (3,696)	0 (0); 1 (2)
NM	127 (79); 6,457 (15,957)	64 (40); 10,512 (25,975)	122 (76); 5,036 (12,445)	330 (205); 17,719 (43,785)	0 (0); 0 (0)
UT	41 (26); 1,564 (3,864)	0 (0); 32 (80)	41 (26); 2,063 (5,098)	36 (22); 1,226 (3,030)	0 (0); 0 (0)
Total	1,161 (722); 69,093 (170,731)	157 (98); 16,590 (40,995)	380 (236); 29,484 (72,857)	1,015 (631); 71,572 (176,859)	685 (426); 28,811 (71,573)

Notes: Totals do not sum because some stream segments have different ownership on each side of the bank resulting in those segments being counted twice. CA/AZ includes the stream segments along the Colorado River where California is on one stream bank and Arizona is on the other. Other/Unclassified includes some local government ownership and unclassified segments (where land ownership was not available).

Basin and Mohave Recovery Unit

Amargosa Management Unit, CA and NV

Updated information and further evaluation led us to modify the areas we are proposing as critical habitat on the Ash Meadows National Wildlife Refuge (see **Changes from Previously Proposed Critical Habitat**). These new areas replace the areas (Carson Slough and the unnamed riparian areas) that were identified in the proposed rule (76 FR 50542, p. 50568). We are proposing as critical habitat five areas on the Ash Meadows National Wildlife Refuge in Nye County, Nevada: Soda Spring segment (0.5 km, 0.3 miles; 1.2 ha, 3.0 ac); Lower Fairbanks segment (0.8 km, 0.5 mi; 2.3 ha, 5.8 ac);

Crystal Reservoir segment (0.5 km, 0.3 mi; 11.7 ha, 28.9 ac); North Tubbs segment (0.2 km, 0.1 mi; 0.3 ha, 0.7 ac); and South Tubbs segment (0.4 km, 0.2 mi; 0.8 ha, 1.9 ac).

These areas were not known to be occupied at the time of listing. These segments, together with the other segments in the Amargosa Management Unit (stream segments of the Amargosa River (12.3 km, 7.7 mi) and Willow Creek (3.5 km, 2.2 mi) in Inyo and San Bernardino Counties, California), are essential for flycatcher conservation because they are anticipated to provide habitat for metapopulation stability, gene connectivity through this portion of the flycatcher's range, protection against catastrophic population loss, and population growth and colonization potential. As a result, these river segments and associated flycatcher habitat are anticipated to support the strategy, rationale, and science of flycatcher conservation in order to meet territory and habitat-related recovery goals.

Gila Recovery Unit

Santa Cruz Management Unit, AZ

We received clarifying information that the proposed critical habitat segment on Cienega Creek did not include the location of a previously known flycatcher breeding territory as well as other recent flycatcher detections and habitat information. We also received new information about a breeding flycatcher and quality habitat along Empire Gulch (a tributary to the headwaters of Cienega Creek) from 2011 flycatcher surveys. Because of the limited information we have for flycatchers in the Santa Cruz

Management Unit, these were important observations. As a result, this revision to proposed critical habitat extends the length of proposed flycatcher critical habitat on Cienega Creek, both upstream and downstream of the segment we identified on August 15, 2011 (76 FR 50542, p. 50574), and adds two short segments of Empire Gulch to the proposed revised critical habitat designation.

The new proposed Cienega Creek segment occurs within the boundary of the Bureau of Land Management's Las Cienegas National Conservation Area. We are extending the flycatcher critical habitat that we are proposing for Cienega Creek upstream and downstream from the original 7.0-km (4.4-mi) segment we proposed on August 15, 2011 (76 FR 50542, p. 50574), to a new 17.9-km (11.1-mi) segment. This new area includes the location of a previously detected flycatcher territory area, locations used by migratory flycatchers, and areas that may develop into future breeding habitat.

We were also provided new information during the comment period about a breeding flycatcher detected on Empire Gulch (a tributary to the headwaters of Cienega Creek) and habitat that may support breeding and migrating flycatchers. As a result, we are proposing to designate as critical habitat one isolated 0.4-km (0.3-mi) upper segment of Empire Gulch and a second 1.3-km (0.8-mi) lower segment of Empire Gulch that connects to Cienega Creek. Both of these segments are within the Las Cienegas National Conservation Area.

Neither of these newly proposed segments on Cienega Creek nor those on Empire Gulch were known to be occupied at the time of listing; however, they are believed to be essential for flycatcher conservation because of their ability to develop and sustain flycatcher habitat and territories to help meet recovery goals in this Management Unit. As noted earlier in this document (see **Public Comments**), we are specifically seeking information about flycatchers and stream segments within the Santa Cruz Management Unit. Both the Santa Cruz River and Cienega Creek segments were identified in the Recovery Plan as areas with substantial recovery value. The addition of the short segments of Empire Gulch is based upon flycatcher detections in 2011, and the fact that they are immediately adjacent to areas identified in the Recovery Plan. These segments are anticipated to provide flycatcher habitat for metapopulation stability, gene connectivity through this portion of the flycatcher's range, protection against catastrophic population loss, and population growth and colonization potential. As a result, these stream segments and associated flycatcher habitat are anticipated to support the strategy, rationale, and science of flycatcher conservation in order to meet territory and habitat-related recovery goals.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We may exclude an area from critical habitat if we

determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus (activities conducted, funded, permitted, or authorized by Federal agencies), the educational benefits of mapping areas containing essential features that aid in the recovery of the listed species, and any benefits that may result from designation due to State or Federal laws that may apply to critical habitat.

When identifying the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan that provides equal or more conservation than a critical habitat designation would provide; avoid disproportionate economic impacts resulting from the designation of critical habitat; or avoid potential conflicts with national security issues or other environmental issues. In the case of the flycatcher, the benefits of critical habitat include public awareness of the presence of flycatchers and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for flycatchers due to protection from adverse modification or destruction of critical habitat. In practice, situations with a Federal nexus exist primarily on Federal lands or for projects carried out, authorized, or funded by Federal agencies.

Additional Sites Considered for Exclusion from Final Designation of Critical Habitat

We have not proposed to exclude any areas from critical habitat under section 4(b)(2) of the Act, but we did identify a number of areas we are considering for exclusion from the final revised critical habitat designation. We are now considering excluding an additional 211.0 km (131.1 mi) of proposed critical habitat, bringing the overall total of areas considered for exclusions, after revisions to one other unit, to 1,451.5 km (901.9 mi) encompassing approximately 135,587 ha (335,043 ac). We have included a list in Table 2 and descriptions of the additional areas we are considering for exclusion beyond those already identified in the August 15, 2011, proposed rule (76 FR 50542, pp. 50581–50594). The additional areas are being considered for exclusion based on other relevant impacts, and the list below is organized by Recovery Unit and Management Unit. The final decision on whether to exclude any areas will be based on the best commercial and scientific data available at the time of the final designation, including information obtained during the comment period and information about the economic impact of designation. Accordingly, we have prepared a draft economic analysis and draft environmental assessment concerning the proposed critical habitat designation, which is available for review and comment (see **ADDRESSES**).

The following areas, listed in Table 2 and described below, are being considered for exclusion from our final critical habitat designation, amending those areas described in the August 15, 2011, proposed rule (76 FR 50542, pp. 50581–50594).

TABLE 2—Amendment to Table 4 in the August 15, 2011, proposed rule (76 FR 50542, pp. 50582–50584). Plan type, stream segments, and approximate stream length being considered for exclusion from flycatcher critical habitat under section 4(b)(2) of the Act by Management Unit. Total represent all exclusions from August 15, 2011, proposed rule and the additional and revised areas listed here.

Basis for possible exclusion	Streams segments considered for exclusion	Approximate stream length considered for exclusion in km (mi)
Santa Clara Management Unit (additional areas)		
Newhall Land and Farm Conservation Easement and Management Plan	Santa Clara River Castaic Creek	18.5 km (11.5 mi) 4.8 km (3.0 mi)
Bill Williams Management Unit (additional areas)		
Lower Colorado River Multi- Species Conservation Plan (LCR MSCP)	Bill Williams River NWR* – Bill Williams River	16.6 km (10.3 mi)
Hoover to Parker Dam Management Unit (additional areas)		
LCR MSCP	Havasu NWR – Colorado River	35.2 km (21.9 mi)
Parker Dam to Southerly International Border Management Unit (additional areas)		
LCR MSCP	Colorado River (Cibola NWR)	17.9 km (11.1 mi)
	Colorado River (Imperial NWR)	38.1 km (23.7 mi)
Roosevelt Management Unit (additional areas)		
Pinal Creek Group/Freeport McMoRan Management Plan	Pinal Creek	5.7 km (3.5 mi)
Lower Rio Grande Management Unit (additional areas)		
Rio Grande Canalization Project	Rio Grande	74.2 km (46.1 mi)
Subtotal of additional stream length being considered for exclusion (this table)		211.0 km (131.1 mi)
San Luis Valley Management Unit (revised areas)		
San Luis Valley Partnership and Regional Habitat Conservation Plan	Rio Grande	141.0 km (87.6 mi)
	Conejos River	69.8 km (43.4 mi)
Total stream length being considered for exclusion (including stream lengths from all areas identified in proposal)		1,451.5 km (901.9 mi)

* NWR—National Wildlife Refuge

Coastal California Recovery Unit: Santa Clara Management Unit, California

Conservation Easement and Management Plan: Newhall Land and Farming Company

Newhall Land and Farming Company (Newhall) controls land holdings and interests along a portion of the Santa Clara River (18.5 km, 11.5 mi) and Castaic Creek (4.8 km, 3.0 mi) confluence proposed as flycatcher critical habitat in Ventura County, California. Newhall has existing and proposed conservation easements for these lands. Some of the effects of nearby commercial and industrial development have been reduced and minimized by implementing conservation measures established through planning documents and section 7 biological opinions issued by the Service. Of the 655 ha (1,619 ac) of Newhall land within the proposed flycatcher critical habitat designation, 119 ha (293 ac) are currently within an existing or pending conservation easement, while the remaining acreage occurs within future or pending conservation easements. We will evaluate the conservation easements, management actions, commitments, and assurances associated with these lands for potential exclusion from the final revised designation of flycatcher critical habitat under section 4(b)(2) of the Act.

Lower Colorado Recovery Unit: Bill Williams, Hoover to Parker Dam, and Parker Dam to Southerly International Border Management Units, Arizona and California

Lower Colorado River Multi-Species Conservation Plan (LCR MSCP), National Wildlife Refuges

In the August 15, 2011, proposed rule (76 FR 50542, p. 50590), we described the reasons for considering excluding the areas within the LCR MSCP. The flycatcher is a key species in the LCR MSCP, where the permittees will create and maintain 1,639 ha (4,050 ac) of flycatcher habitat over the 50-year life of the permit and habitat conservation plan (2005 to 2055). Additional research, management, monitoring, and protection of flycatchers and flycatcher habitat from fire, nest predators, and brood parasites will occur. In our description of this plan, we explained how the LCR MSCP works in conjunction with the four National Wildlife Refuges (Bill Williams, Havasu, Cibola, and Imperial) along this stretch of the Colorado River for management of flycatcher habitat. We intended to include these National Wildlife Refuges as part of the areas being considered for exclusion from the final critical habitat designation because of the management and protections provided by the LCR MSCP. However, we inadvertently omitted these areas from the areas calculated in Table 4 of the proposed rule (76 FR 50542, August 15, 2011, p. 50583). We are now providing notice that the areas being considered for exclusion within the LCR MSCP do include the National Wildlife Refuges as listed above in Table 2. The refuges occur within the Bill Williams Management Unit, Arizona; the Hoover to Parker Dam Management Unit, Arizona and California; and the Parker Dam to Southerly International Border Management Unit, Arizona and California.

Gila Recovery Unit: Roosevelt Management Unit, Arizona

Management Plan and Partnership: Pinal Creek Group and Freeport-McMoRan
Remedial Action Program and Flycatcher Management Plan

The Pinal Creek Group, represented by Freeport McMoRan, is actively implementing the Water Quality Assurance Revolving Fund Remedial Action Program required by the Arizona Department of Environmental Quality Consent Order issued in April 1998 along lower Pinal Creek in Gila County, Arizona. These actions occur throughout the proposed 5.7 km (3.5 mi) of proposed flycatcher critical habitat. The primary purpose of this Remedial Action Program is the monitoring, extraction, and treatment of contaminated Pinal Creek groundwater. Implementation of these remedial projects has resulted in improved abundance, distribution, and quality of riparian habitat for flycatchers.

The extraction, treatment, and discharge of Pinal Creek groundwater onto the surface of the Pinal Creek bed and associated land management actions have been the primary actions that have helped establish and maintain increased abundance of riparian vegetation. The goal of the habitat mitigation and monitoring plan associated with the Remedial Action Program is the maintenance and long-term restoration of riparian habitat, dominated by native tree species. In addition to a more constant surface water and elevated groundwater table available to grow riparian plants, cattle grazing pressure on vegetation has been limited within the Pinal Creek area through fencing and modification of previous grazing strategies. Cattle grazing is now eliminated during the growing season (April through October). Also, nonnative plant management has reduced

the occurrence of flammable plants and the potential impacts of wildfire. Much of these lands are also fenced properties that limit both public access and actions that could impact vegetation. From 1999 to 2007, these actions resulted in a 130 percent increase in total riparian vegetation volume within the 117-ha (290-ac) mitigation area. We will coordinate with the Pinal Creek Group and Freeport-McMoRan and examine what flycatcher conservation actions, management plans, and commitments and assurances occur on these lands to consider Pinal Creek for exclusion from the final revised designation of flycatcher critical habitat under section 4(b)(2) of the Act.

Rio Grande Recovery Unit: San Luis Valley Management Unit, Colorado

San Luis Valley Partnership and San Luis Valley Regional Habitat Conservation Plan

In the August 15, 2011, proposed rule (76 FR 50542, p. 50593), we described the reasons for considering excluding non-federal lands within the San Luis Valley Partnership. However, the total stream miles (159.4 km (99.0 mi)) listed in the proposed rule as being considered for exclusion in the San Luis Valley mistakenly included Federal lands along the Rio Grande. We are not considering excluding those Federal lands (18.4 km (11.4 mi)) on the Alamosa National Wildlife Refuge along the Rio Grande. So only non-Federal lands totaling 141.0 km (87.6 mi) along the Rio Grande and 69.8 km (43.4 mi) along the Conejos River are being considered for exclusion in the San Luis Valley Management Unit.

As one element of the private land conservation efforts, a collection of San Luis Valley,

Colorado, towns, cities, counties, Federal agencies, and the State of Colorado are developing an HCP for the San Luis Valley. Public review and completion of the HCP is anticipated to overlap the rulemaking timeframe for this flycatcher critical habitat revision. The HCP as proposed would cover nearly 1.2 million ha (3 million ac) and 400 km (250 mi) of riparian habitat that could be used by the flycatcher and other riparian and aquatic-based species. The acreage covered by the regional HCP encompasses the entire Colorado portion of the San Luis Valley Management Unit, as described in the Recovery Plan, and extends well beyond the two stream segments along the Rio Grande and Conejos Rivers proposed as flycatcher critical habitat.

The San Luis Valley Regional HCP, if finalized before the completion of the final rule, could be the support for an exclusion under section 4(b)(2) of the Act. We are considering excluding the proposed segments of the Rio Grande and Conejos River in the San Luis Valley Management Unit (excluding the Alamosa NWR) from the final designation of revised flycatcher critical habitat.

Lower Rio Grande Management Unit, New Mexico

Management Plan and Partnership: Rio Grande Canalization Project

The Elephant Butte Irrigation District (EBID), El Paso County Water Improvement District No. 1 (EP#1), and United States Section of the International Boundary and Water Commission (IBWC) are planning restoration of riparian habitat along the Rio Grande in New

Mexico from Percha Dam to American Dam, a portion of which, from Caballo Dam to Ft. Selden, has been proposed as critical habitat. The EBID and EP#1 manage the water from the Rio Grande in Elephant Butte Reservoir for beneficial use (including use for agricultural and municipal needs), and the IBWC is responsible for maintaining levees and channel and floodway management along this section of the lower Rio Grande (termed the Rio Grande Canalization Project). EBID, EP#1, the Audubon Society, and IBWC are establishing an agreement for a water transaction program that would provide water in the Rio Grande to a number of riparian sites for which IBWC has committed restoration plans. Through restoration plan and other commitments documented in a 2011 biological assessment, this partnership will conduct a variety of flycatcher and flycatcher habitat management actions in this area.

The restoration plan includes up to 30 riparian restoration sites, of which about 8 are specifically designed to create flycatcher habitat on at least 21 ha (53 ac) and as many as 42 ha (105 ac), and to include management of saltcedar that is intermixed with cottonwood, willow, mesquite, and arrowweed to maximize potential value for nesting or migratory flycatchers. These sites are to be restored by 2019. The restoration plan also calls for discontinuing mowing willows along the river for the benefit of flycatchers and planting willows in other areas where hydrological conditions are favorable. Restoration efforts will also physically reconnect old river channels and lower incised banks to the main river channel where appropriate. These efforts should result in additional flycatcher habitat beyond the minimum restoration sites. The restoration plan has established collaborative relationships between the EBID, EP#1, IBWC, Audubon Society, and Service to benefit the flycatcher, including monitoring for flycatcher presence and habitat

condition throughout the reach. Because of the commitment to a comprehensive flycatcher management plan, development and agreements on the water transaction program and overall restoration plan, we will consider excluding the Lower Rio Grande segment from the final designation of revised flycatcher critical habitat under section 4(b)(2) of the Act.

Effects of Critical Habitat Designation

Draft Economic Analysis

The purpose of the draft economic analysis is to identify and analyze the potential economic impacts associated with the proposed flycatcher critical habitat revision. The draft economic analysis describes the economic impacts of all potential conservation efforts for the flycatcher; some of these costs will likely be incurred regardless of whether we designate critical habitat. The economic impact of the proposed critical habitat designation is analyzed by comparing scenarios both “with critical habitat” and “without critical habitat.” The “without critical habitat” scenario represents the baseline for the analysis, considering protections already in place for the species (e.g., under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical

habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs; these are the costs we may consider in the final designation of critical habitat when evaluating the benefits of excluding particular areas under section 4(b)(2) of the Act. The analysis looks retrospectively at baseline impacts incurred since the species was listed, and forecasts both baseline and incremental impacts likely to occur if we finalize the proposed revised critical habitat designation. For a further description of the methodology of the analysis, see Chapter 2, “Framework for the Analysis,” of the draft economic analysis.

The draft economic analysis provides estimated costs of the foreseeable potential economic impacts of the proposed critical habitat designation for the flycatcher over the next 20 years (2012-2031) which, for most parts of the analysis, was determined to be the appropriate period for analysis. This is because limited planning information is available for most activities to forecast activity levels for projects beyond a 20-year timeframe. The draft economic analysis estimates impacts to water management activities, however, over a 30-year period (2012–2041).

The draft economic analysis estimates economic impacts of flycatcher conservation efforts associated with the following categories of economic activity: (1) Water management activities; (2) livestock grazing; (3) residential and related development; (4) tribal activities; (5) transportation; (6) mining and oil and gas development; and (7) recreation activities. The total potential incremental economic impacts for all of the categories in areas proposed as revised critical habitat over the next

20 years range from \$11 million to \$19 million (\$940,000 to \$1.7 million annualized), assuming a 7 percent discount rate. A very brief summary of the estimated impacts within each category is provided below. Please refer to the draft economic analysis for a comprehensive discussion of the potential impacts.

Transportation

Our analysis suggests that transportation activities, such as road and bridge construction and maintenance, may experience the largest impacts. Transportation projects were more difficult to forecast, resulting in potential overstatement of the impacts. Our impact estimates were based on an increased level of consultation activity (and resulting project modifications for flycatcher conservation efforts) that is higher than the historical record of past activities. Transportation agencies at the Federal, State, and local level could incur costs associated with monitoring and education activities, fencing, habitat restoration and creation, timing restrictions, and administrative activities. Incremental impacts may reach \$5.8 million over 20 years.

Water Management

Impacts to water management activities may be the next largest of any of the affected economic activities; however, the majority of the impact of conservation efforts to protect flycatcher will occur even if critical habitat is not designated (they are baseline impacts). All but two of the major dams and reservoirs within flycatcher proposed

revised critical habitat, the Hansen Dam and the Mohave Dam, are located along river segments where the species' presence is either currently addressed, or otherwise well known to project proponents and managing agencies. Associated impacts in these areas are therefore assumed to be baseline, where most conservation activities and associated costs will occur regardless of whether critical habitat is designated. An exception is Luna Lake in the San Francisco Management Unit; although flycatcher territories have been detected in the area, Luna Lake does not have existing management plans for the flycatcher, and species occupancy may not be well known. Therefore, we assume that forecasted water management activity costs there are incremental.

Incremental impacts over the next 30 years (assuming a 7 percent discount rate) range from \$1.4 million to \$9.6 million. These incremental impacts include the costs of conservation efforts associated with section 7 consultations or the development of HCPs, as well as administrative efforts to consider potential adverse modification of habitat as part of future section 7 consultations.

Livestock Grazing

Impacts to grazing activities are likely to be smaller relative to water and transportation activities, but are anticipated to affect a broader geographic area. Grazing currently occurs in 27 of the 29 Management Units that include proposed revised critical habitat. As a result, some impacts may be experienced in most units. On Federal lands, reductions in grazing allotments are possible depending on the specific conditions within

the unit. The estimated potential, present value incremental costs range from \$2.2 million to \$3.5 million over the 20-year time period of the analysis. Impacts include the administrative costs of consultation with the Service, the lost value of grazing permits associated with reductions in authorized Animal Unit-Months, costs of constructing and maintaining fencing, and costs of cowbird trapping.

Residential and Commercial Development

Residential and related development activities are likely to be smaller in magnitude than grazing impacts; however estimated impacts are concentrated over a smaller geographic area. Nearly all impacts to development activities are estimated to occur in the California Management Units. Areas likely to see the greatest development pressure include Santa Barbara, Ventura, Los Angeles, Riverside, San Bernardino, and San Diego Counties, California, and Mohave County, Arizona.

Because the proposed revised critical habitat is located within the 100-year floodplain, the Federal Emergency Management Agency will regulate real estate development in any critical habitat we eventually designate. As a result, additional restrictions may be imposed by individual or local jurisdictions. The restrictions or regulations may require flood control facilities or other special engineering, often making development in floodways impractical and prohibitively expensive. Due to existing development restrictions, lands within proposed critical habitat that can be feasibly

developed would be limited to areas where real estate demand is high enough to justify the costs associated with developing the floodplain.

Incremental impacts to residential development are estimated at \$810,000 over 20 years. These are related to reduced land value associated with the need to set aside land on-site for the flycatcher; the need to implement additional project modifications, such as cowbird trapping, fencing, monitoring, and habitat management; time delays; and administrative costs. Because of the availability of alternative lands that would not be designated as critical habitat in these regions, these costs are likely to be borne by existing landowners in the form of reduced value for their existing properties. The estimated impacts would be felt immediately, in 2012, upon promulgation of the final rule, and reflect the change in the future, productive use of the properties.

Tribal Activities

Incremental impacts to tribal activities of approximately \$660,000 are estimated to be associated with administrative impacts over the 20-year time frame of the analysis. However, tribal concerns focus on the potential impact that the designation could have on their ability to make use of natural resources, including water rights, on their sovereign lands. The absence of some cost information related to potential impacts of flycatcher critical habitat on tribal lands results in a probable underestimate of future costs to tribal entities. Lands belonging to 20 Tribes included within the boundaries of proposed revised critical habitat are under consideration for exclusion from the final designation.

Mining, and Oil and Gas Development

In 2005, potential impacts to oil and gas development were not identified as a significant issue and thus were not considered in the previous economic analysis. However, proposed revised critical habitat in the San Juan Management Unit in San Juan County, Utah, and La Plata County, Colorado, generated concern, because this area serves as a highly-developed source of oil and natural gas, with hundreds of existing wells. Due to the level of existing protections in riparian areas required by, or agreed to by, oil and gas developers and land and resource managers, no project modification costs are expected as a result of the designation of revised flycatcher critical habitat. However, baseline administrative costs of \$33,000 for one formal and six informal consultations are expected due to limited oil and gas activities, including seismic studies and pipeline construction and maintenance. In addition to baseline costs, the analysis forecasts \$11,000 in incremental administrative costs to consider adverse modification as part of these consultations.

While few active mineral mining activities occur within the proposed revised critical habitat, the mining industry has expressed concern that water use by existing or potential mining operations could be affected by flycatcher conservation activities, particularly the designation of critical habitat. There are currently no data that indicate whether existing or future diversions of water for mining activities (including groundwater pumping) reduce stream flow or modify hydrologic conditions to the degree

that adversely impacts the flycatcher and its riparian habitat. As such, the analysis does not quantify the probability or extent to which water use for mining purposes would need to be curtailed or modified to remedy impacts to flycatcher. Additionally, impacts to extractive mining operations, such as sand and gravel pits, that cause direct habitat loss may occur as the result of critical habitat designation. However, project modification costs associated with these operations are uncertain due to the limited consultation history, and, as a result, our analysis is unable to forecast economic impacts for mining activities.

Recreation

Incremental impacts to recreational activities are unlikely to result from the designation. In the baseline, activities may be affected at Lake Isabella and Lake Roosevelt; however, baseline economic impacts in these areas are likely to be limited to \$1.9 million over 20 years. In addition, management activities at a picnic site in the San Bernardino National Forest results in present value baseline costs of \$40,100.

Draft Environmental Assessment

The purpose of the draft environmental assessment, prepared pursuant to the NEPA, is to identify and disclose the environmental consequences resulting from the proposed action of designating revised critical habitat for the flycatcher (please see further NEPA discussion below). In the draft environmental assessment, three

alternatives are evaluated: Alternative A, the proposed rule with exclusion areas; Alternative B, proposed rule without exclusion areas; and the no action alternative that would leave the 2005 designated critical habitat in place. Under Alternative A, stream segments identified as being considered for exclusion could potentially be excluded in the final rule based on economic impact, national security, or other relevant impacts. The no action alternative is required by NEPA for comparison to the other alternatives analyzed in the draft environmental assessment. See **ADDRESSES** for information on how to obtain a copy of the draft environmental assessment.

As we stated earlier, we are soliciting data and comments from the public on the draft economic analysis and draft environmental assessment, as well as all aspects of the proposed rule and our amended required determinations. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the public comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

Required Determinations—Amended

In our August 15, 2011, proposed rule (76 FR 50542, pp. 50594–50596), we indicated that we would defer our determination of compliance with several statutes and executive orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the

draft economic analysis. We have now made use of the draft economic analysis data to make these determinations. In this document, we affirm the information in our August 15, 2011, proposed rule concerning E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), and the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951). However, based on the draft economic analysis data, we are amending our required determination concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). We are also updating our determinations concerning E.O. 12630 (Takings), E.O. 13211 (Energy, Supply, Distribution, and Use), and the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification

statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. Based on our draft economic analysis of the proposed designation, we provide our analysis for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term “significant economic impact” is meant to apply to a typical small business firm’s business operations.

To determine if the proposed designation of critical habitat for the flycatcher would affect a substantial number of small entities, we considered the number of small

entities affected within particular types of economic activities, such as (1) transportation; (2) water management; (3) livestock grazing; and (4) residential and commercial development. Other activities analyzed in the economic analysis, in particular, impacts to mining and recreation, found no incremental impacts and so were not further analyzed for effects on small entities. In order to determine whether it is appropriate for our agency to certify that this proposed rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Critical habitat designation will not directly affect activities that do not have any Federal involvement; designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. In areas where the flycatcher is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect the species. If we finalize the proposed revised critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In the draft economic analysis, we evaluated the potential economic effects on small entities resulting from implementation of conservation actions related to the proposed revised designation of critical habitat for the flycatcher. Please refer to Appendix A in the draft economic analysis of the proposed critical habitat designation for a more detailed discussion of potential economic impacts. Our analysis of the five industries with possible incremental impacts on small business was based on the

proportion of small entities affected within each industry and the annualized costs per entity as a percent of annual revenues. The following summary highlights the results of our analysis:

(1) For water management, we estimated that 1 small entity could be affected, representing 0.07 percent of the 1,350 small entities in the study area. The annualized effects represent 0.01 to 0.08 percent of the annual revenues of that one entity.

(2) For livestock grazing and residential and commercial development, the analysis distinguishes between entities expected to bear project modification costs with administrative costs and those expected to bear only administrative costs because the expected magnitude of impacts differs significantly across the two groups. We estimated three small grazing entities could be affected by both project modification and administrative costs, representing 0.49 percent of the 517 small entities in the study area. The annualized impacts per small entity in this group are expected to range from 0.24 percent to 0.43 percent of annual revenues. A further 29 small grazing entities may incur some minor administrative costs associated with informal consultations and technical assistance efforts, representing approximately 5.6 percent of small grazing entities across the study area. Annualized impacts per small entity for this group of 29 are estimated at 0.12 percent of annual revenues.

(3) We estimated 1 small entity in the residential and commercial development industry could be affected by land value loss and administrative costs, representing less

than 0.01 percent of the 76,516 small entities in the study area. The annualized effects represent 5.72 percent of the annual revenues of that entity. We estimated 6 small residential and commercial development entities could experience administrative costs only, representing less than 0.01 percent of the small entities in the study area. The annualized effects per small entity for this group represent 0.05 percent of annual revenues.

(4) For transportation, we forecast some administrative costs associated with roads that may be managed by county or city governments. Using GIS data to identify where roads cross the proposed revised critical habitat designation, the analysis forecasts informal and technical assistance efforts in 4 counties out of the 49 counties in the study area. Of these counties, 3 counties, or 75 percent, have populations falling below 50,000 and therefore are considered small. Third-party administrative costs for these three counties represent between 0 and 0.06 percent of the respective county's annual revenues.

(5) For oil and gas development, we estimated 7 small entities could be affected, representing 2.3 percent of the 300 small entities in the study area. The annualized effects per small entity represent less than 0.01 percent of annual revenues.

None of the impacts rises to a level of a significant economic impact on a substantial number of small entities. We did estimate a substantial number of small livestock grazing entities (5.6 percent) could be impacted due to potential additional administrative costs. However, the impacts are not significant because they represent

only 0.12 percent of the estimated annual revenues of those small entities. Alternately, we estimated an economic impact of 5.72 percent of annual revenues for one small entity in the residential development industry based on forecasted land value loss and administrative costs. However, this entity represents a very small percentage of small entities (less than 0.01 percent) in the development industry that will be affected. So although there is one industry (livestock grazing) with a substantial number of entities affected, and one industry (residential development) that has a small entity with potentially substantial impacts, there are no industries with significant economic impacts on a substantial number of small entities.

In summary, we have considered whether the proposed designation of revised critical habitat for the flycatcher would result in a significant economic impact on a substantial number of small entities. Information for this analysis was gathered from the Small Business Administration, stakeholders, and the Service. We have estimated the number of small entities that may be impacted in each industry affected by the proposed critical habitat designation. For the above reasons and based on currently available information, we certify that, if promulgated, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Regulatory Planning and Review—Executive Orders 12866 and 13563

Executive Order (E.O.) 12866 provides that the Office of Information and

Regulatory Affairs (OIRA) will review all significant rules. The OIRA has determined that this rule is not significant. E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Takings—Executive Order 12630

In this document, we affirm the information in our proposed rule concerning E.O. 12630 (Takings), having reviewed the preliminary assessment and the draft economic assessment, and prepared a Takings Implication Assessment. Although there may be some costs likely to be borne by existing landowners in the form of reduced value for their existing properties, these impacts are not expected to be significant, and therefore will not result in a significant takings implication.

Energy, Supply, Distribution, and Use— Executive Order 13211

We stated in our August 15, 2011, proposed rule that the proposed revised designation is not expected to significantly affect energy supplies, distribution, or use because there are no pipelines, distribution facilities, power grid stations, etc. within the boundaries of proposed revised critical habitat. However, the San Juan Management Unit in San Juan County, Utah, and La Plata County, Colorado is expected to sustain limited oil and gas activities, including seismic studies and pipeline construction and maintenance. Our draft economic analysis reflects that we do not expect these activities to incur any project modification costs, but the analysis does estimate that over the next 20 years, there will be about \$11,000 in incremental administrative costs to consider adverse modification as part of consultations on these activities. We do not consider these costs to be significant. Therefore, we affirm that this action is not a significant energy action and no Statement of Energy Effects is required.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to NEPA in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)). However, because the range of the flycatcher includes States within the Tenth Circuit and under the Tenth Circuit ruling in *Catron County Board of*

Commissioners v. U.S. Fish and Wildlife Service, 75 F.3d 1429 (10th Cir. 1996), we have undertaken a NEPA analysis and drafted an environmental assessment for the proposed critical habitat designation.

We have completed a draft environmental assessment, and it is now available for public review and comment (see **ADDRESSES**). The draft environmental assessment found that the designation of critical habitat for the southwestern willow flycatcher would not have direct impacts on the environment; designation is not expected to impose land use restrictions or prohibit land use activities. However, the designation of critical habitat could: (1) Increase the number of additional section 7 consultations for proposed projects within designated critical habitat; (2) increase the number of reinitiated section 7 consultations for ongoing projects within designated critical habitat; (3) maintain the southwestern willow flycatcher's primary constituent elements; (4) increase the likelihood of greater expenditures of time and Federal funds to develop measures to prevent both adverse effects to the species and adverse modification to critical habitat; and (5) indirectly increase the likelihood of greater expenditure of non-Federal funds by project proponents to complete section 7 consultations and to develop reasonable and prudent alternatives (to avoid adverse modification of critical habitat by Federal agencies) that maintain critical habitat. Such an increase might occur where there is a Federal nexus to actions within areas with no known flycatcher territories, or from the addition of adverse modification analyses to jeopardy consultations in known flycatcher habitat.

Based on comments we received in preparing the previous critical habitat designation in 2005, internal scoping within the Service, a review of the previous consultation history of the species, and a review of public comments we received on the August 15, 2011, proposed rule, the Service analyzed the potential impacts of critical habitat designation on the following resources and resource management types: land use and management; fish, wildlife, and plants (including endangered and threatened species); fire management; water resources (including water management projects and groundwater pumping); livestock grazing; construction and development; tribal trust resources; soils and mineral resources; recreation; socioeconomics; and environmental justice.

The primary purpose of preparing an environmental assessment under NEPA is to determine whether a proposed action would have significant impacts on the human environment. If significant impacts may result from a proposed action, then an environmental impact statement is required (40 CFR 1502.3). Whether a proposed action exceeds a threshold of significance is determined by analyzing the context and the intensity of the proposed action (40 CFR 1508.27). The draft environmental assessment found that the impacts of the proposed critical habitat designation would be minor and not rise to a significant level, so preparation of an environmental impact statement is not required.

Authors

The primary authors of this notice are the staff members of the Arizona Ecological Services Office and the Southwest Regional Office, U.S. Fish and Wildlife Service.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to further amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as proposed to be amended at 76 FR 50542, August 15, 2011, as follows:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99-625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.95(b) by revising paragraphs (b)(4), (b)(5), (b)(14), and (b)(28) of

the entry for “Southwestern Willow Flycatcher (*Empidonax traillii extimus*)” to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(b) *Birds.*

* * * * *

Southwestern Willow Flycatcher (*Empidonax traillii extimus*)

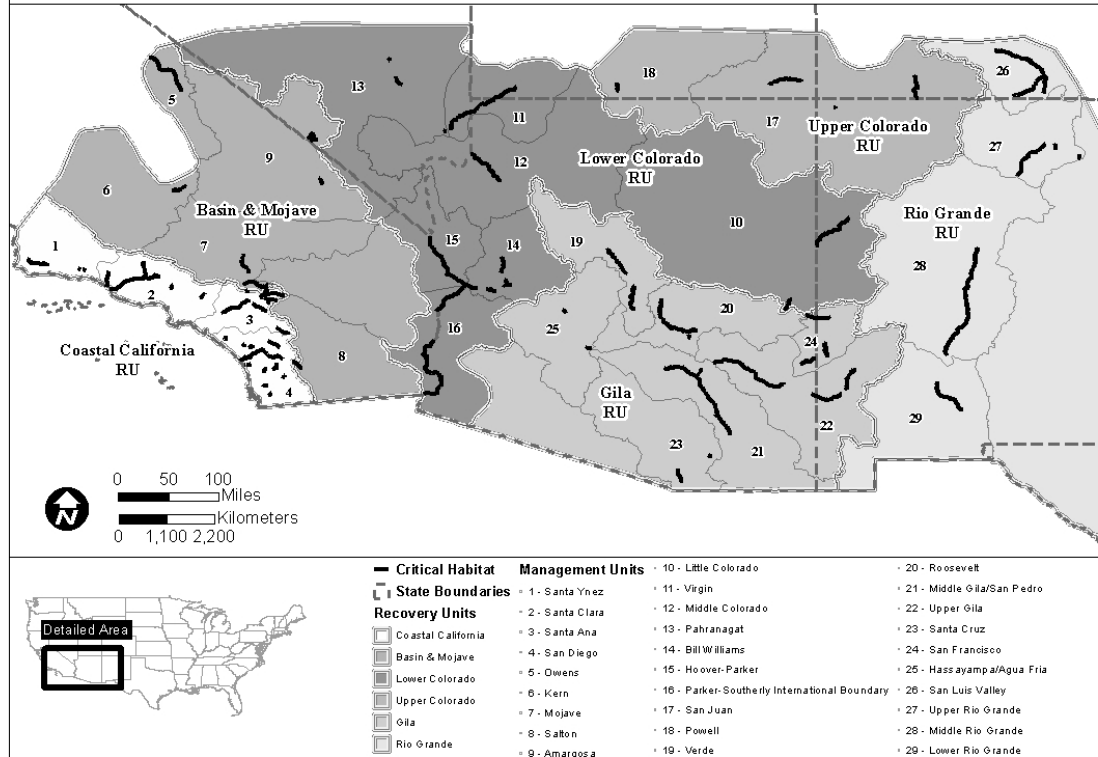
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(4) *Critical habitat map units.* Data layers defining map units were created in two steps. First, the linear segments were mapped from the National Hydrologic Dataset using USA Contiguous Equidistant Conic (North American Datum 1983) coordinates. Next, the lateral extents were digitized over the most recent available aerial photography using Albers Equal Area Conic (North American Datum 1983) coordinates. The textual description for each critical habitat unit below includes the Universal Transverse Mercator (UTM) zone and UTM easting (E) and northing (N) coordinate pairs for the starting and ending points. The maps in this entry, as modified by any accompanying

regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site, <http://www.regulations.gov> at Docket No. FWS-R2-ES-2011-0053 and at the field office responsible for the designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) The index map of southwestern willow flycatcher critical habitat units follows:

General Locations of Critical Habitat for the Southwestern Willow Flycatcher Overview Map



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(14) Amargosa Management Unit.

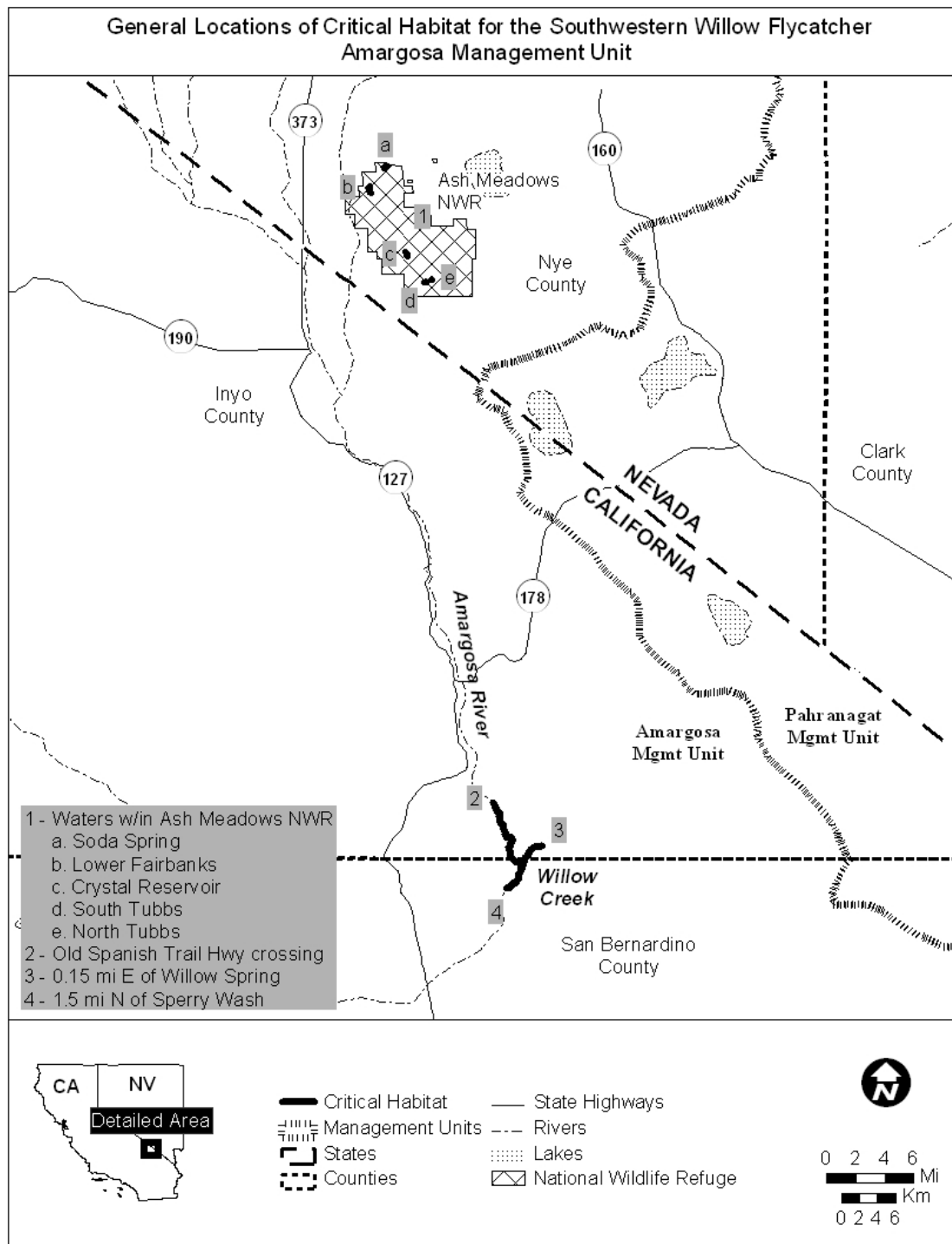
(i)

Stream Segment	Start: UTM Zone, E, N	End: UTM Zone, E, N
Amargosa River	11, 569473, 3967513	11, 570730, 3958035
Willow Creek	11, 574000, 3962736	11, 572077, 3960419
Soda Spring-Ash Meadow NWR	11, 559403, 4038347	11, 559129, 4038029
Lower Fairbanks-Ash Meadow NWR	11, 557830, 4036090	11, 557906, 4035290
Crystal Reservoir-Ash Meadows NWR	11, 561025, 4028706	11, 561307, 4028269
North Tubbs- Ash Meadows NWR	11, 562782, 4025402	11, 562970, 4025330
South Tubbs – Ash Meadows NWR	11, 563505, 4025681	11, 563483, 4025650

(ii) Ash Meadows Riparian Areas and Carson Slough (UTM zone 11, E, N):

[Reserved]

(iii) Map of Amargosa Management Unit follows:



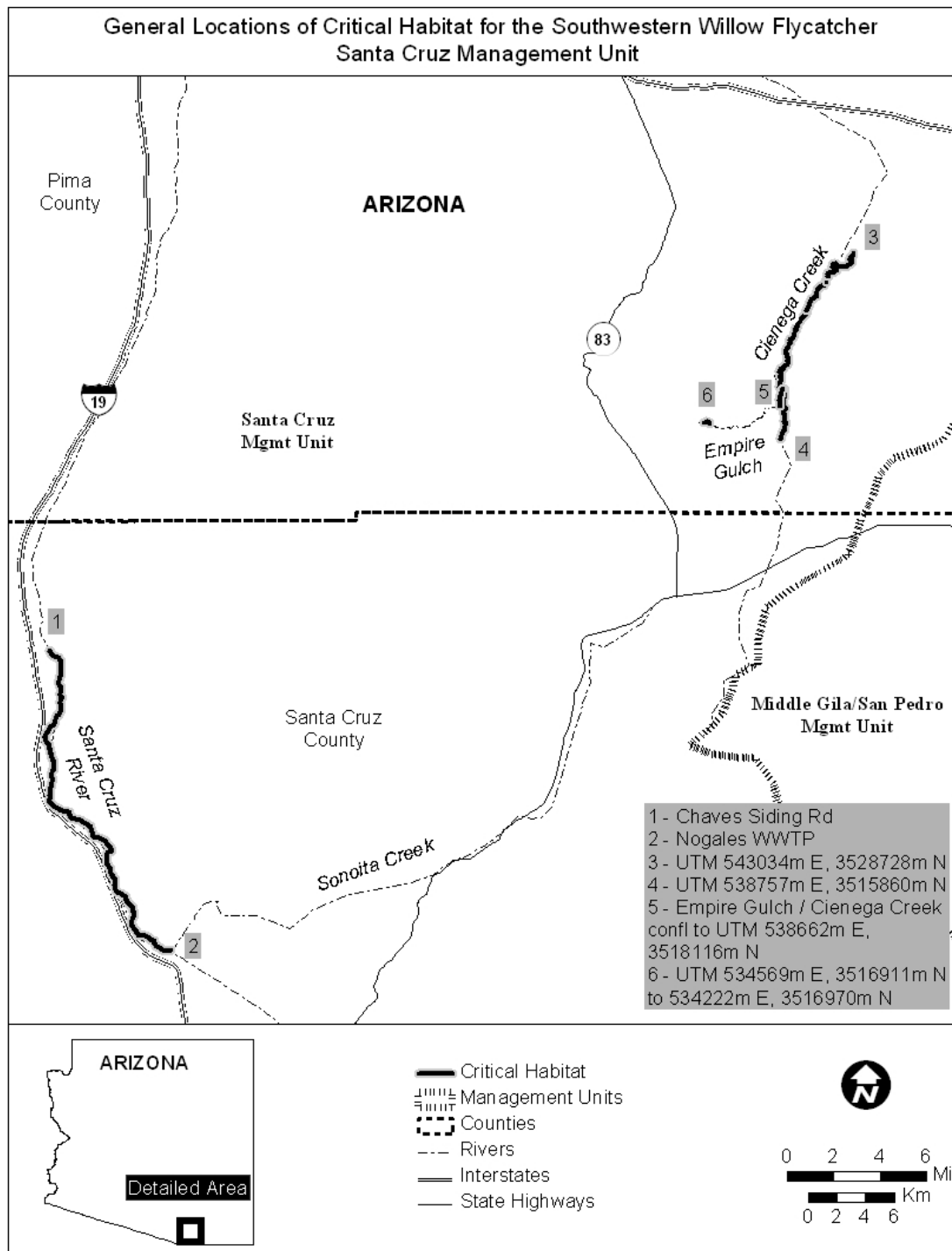
* * * * *

(28) Santa Cruz Management Unit.

(i)

Stream Segment	Start: UTM Zone, E, N	End: UTM Zone, E, N
Santa Cruz River	12, 502742, 3480432	12, 502742, 3480432
Cienega Creek	12, 543034, 3528728	12, 538757, 3515860
Empire Gulch (upper)	12, 534569, 3516911	12, 534222, 3516970
Empire Gulch (lower)	12, 538826, 3519337	12, 538662, 3518116

(ii) Map of Santa Cruz Management Unit follows:



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Date: June 28, 2012

Michael J. Bean

Acting Assistant Secretary for Fish and Wildlife and Parks

**~~[Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat
for the Southwestern Willow Flycatcher]~~**

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